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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

No._____

LEE R. CUNNINGHAM,
Petitioner,

vs.

NATIONAL RAILROAD PASSENGER CORPORATION d/b/a AMTRAK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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IN THE

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THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOHN C. GREEN
ROBERT W. GEDDES

SMITH and JONES
One Indiana Square,
Suite 2470
Indianapolis, Indiana 4620

Counsel for Petitioner

The Petitioner, Lee R. Cunningham, respectfully prays that a Writ of Certiorari issue to review the opinion and decision of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 28, 1981.

QUESTIONS PRESENTED FOR REVIEW

I.

Whether 45 U.S.C. §53 (Federal Employer's Liability Act §3) prohibited the District Court jury from apportioning the proven proximate cause and negligence of Amtrak and whatever contributory negligence of Cunningham inhered in his manner of performance so as to diminish his damages to zero and thus to deny him any recovery whatever, contravening the intent of the Act.

II.

Whether Cunningham's Motion For A New Trial should have been granted when the substantial and uncontroverted evidence supported his claim of Amtrak negligence and proximate cause of the injury, when Amtrak offered no evidence in defense but instead rested its case at the end of the claimant's evidence in chief, and when Cunningham's answers on cross-examination went only to his possible contributory negligence.

TABLE OF CONTENTS

		Page
I.	Table Of Statutes	i
II.	Table of Authorities.	ii
III.	Jurisdiction.	1
IV.	Statement Of Facts.	1
V.	Statement Of The Case	4
VI.	Argument:	
	I. The Verdict Is Contrary To Law	14
	II. Error In Refusing New Trial.	18
VII.	Appendix:	
	a. Order (by Court of Appeals) .	A1
	b. Judgment (by District Court).	A5
	c. Instruction No. 10.	A6
	d. Motion For New Trial.	A7
	e. Appellant's Petition For Rehearing	A11
	f. Statutes:	
	1. 45 U.S.C. §51	A15
	2. 45 U.S.C. §53	A17

TABLE OF STATUTES

28 U.S.C. §1254 . . . . . .

28 U.S.C. §1331 . . . . . .

45 U.S.C. §51 . . . . . .

45 U.S.C. §53 . . . . . .

TABLE OF AUTHORITIES

5 Am.Jur.2d 276 "Appeal and Error §835"

Blair v. Baltimore and O.R.R., 323 U.S. 600, 65 S.Ct. 545, 89 L.Ed. 490 (1945)

Deere v. Southern Pacific Co., 123 F.2d 438 (9th Cir. 1941) cert. denied, 315 U.S. 819, 62 S.Ct. 916, 86 L. Ed. 1217 (1942)

Eggert v. Norfolk & W.Ry. Co., (2nd Cir. 1976) 538 F.2d 509

Gallick v. Baltimore and Ohio R.R. Co., 372 U.S. 108, 83 S.Ct. 659, 9 L. Ed.2d 618 (1963)

Gibson v. Elgin, Jolliet and Eastern Railroad Company, (1957, 7th Cir.) 246 F.2d 834

Rodriguez v. Delray Connecting Railroad, (6th Cir. 1972) 473 F.2d 819

Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 506, 508, 77 S.Ct. 443, 448, 1 L.Ed.2d 493

Tennant v. Peoria and Pekin Union Railroad Co., 321 U.S. 29, 65 S.Ct. 409, 88 L.Ed. 520, rehearing denied, 321 U.S. 802, 64 S.Ct. 610, 88 L.Ed. 1089 (1944)

Webb v. Illinois Central Railroad Co., 352 U.S. 512, 77 S.Ct. 451, 1 L. Ed.2d 503, rehearing denied, 353 U.S. 943, 77 S.Ct. 800, 1 L.Ed.2d 764 (1957)

JURISDICTION

The Court of Appeals entered its unpublished opinion and decision on January 28, 1981, and denied Cunningham's timely Petition For A Rehearing on February 20, 1981. Within the next ninety (90) days he filed this Petition for Certiorari.

Supreme Court jurisdiction is conferred by 28 U.S.C. §1254 (1):

> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

Statutes involved are 45 U.S.C. §51 and §53.

District Court jurisdiction arises from 28 U.S.C. §1331.

STATEMENT OF FACTS

Relevant Proceedings

Cunningham on June 21, 1977 filed his Complaint against Amtrak in the District Court, Southern District of Indiana, for recovery under the Federal Employer's Liability Act for personal injuries sustained on July 1, 1976 while working at Amtrak's Beech Grove Maintenance Facility in Beech Grove, Indiana. (R. 5-6) Amtrak denied liability. (R. 7-8) Trial was by a jury of six (6) persons. (R. 286)

At the close of Cunningham's case in chief, Amtrak moved for a directed verdict. The Court granted the Motion as to some of Cunningham's theories of negligence and denied it as to others. (R. 287; Tr. Vol. 2 at 259-65)

After the District Court's ruling, Amtrak rested without presenting any evidence. It then renewed the Motion For A Directed Verdict, which was denied.

(R. 286-87; Tr. Vol. 2 at 271-74) Cunningham did not move for a directed verdict.

The jury returned the general verdict for Amtrak. On January 31, 1980, the District Court entered judgment for Amtrak on the jury verdict. Cunningham made no Motion for judgment notwithstanding the verdict. (R. 285-88)

Cunningham on February 11, 1980 filed his Motion For A New Trial on the grounds, relevant here, that the verdict was contrary to law, contrary to the evidence and contrary to the weight of the evidence. (R. 289) The Motion was denied on February 12, 1980. (R. 291)

Thereafter, Cunningham perfected a timely appeal to the Court of Appeals for the Seventh Circuit. The Court of Appeals affirmed the judgment below. The Petitioner's timely Petition For

Rehearing was denied on February 20, 1981.

STATEMENT OF THE CASE

Beginning in 1964 the Petitioner Cunningham worked continuously in the maintenance and repair of railroad cars at the Beech Grove Shops, Beech Grove, Indiana. He started working for Amtrak in 1975 in the Trim Shop at the Beech Grove Shops. (Tr. 4, 7) In 1976 he was transferred to the spray-paint area of the Trim Shop where he spray-painted doors, vents and other car parts which came into his area for painting. (Tr. 8; Appendix Exhibits 1 and 2) His working hours were from 7:00 a.m. to 3:30 p.m. (Tr. 9)

When he started the spray-painting assignment his foreman was in charge of the spray-paint area and also of a

separate sanding area. (Tr. 11)

Before July 1, 1976, employees from the sanding area would sand out car end doors and move them to the spray-paint area for painting. (Tr. 12, 13) The end doors were about five and one-half (5 1/2) feet long and three and one-half (3 1/2) feet wide and some two (2) inches thick. Their weight varied from seventy-five (75) to one hundred thirty (130) pounds. (Tr. 12, 243)

The car end doors were brought into the spray-paint area on a four-wheel wagon, which was pulled by hand. It was about twenty (20) inches high, four (4) feet long and thirty-six (36) inches wide. (Tr. 2-14) The door had to be removed from the wagon and hung on hooks for painting. (Tr. 18; Plaintiff's Exhibit 3) Cunningham's foreman never gave him instructions on how to do any

of his tasks. Cunningham taught himself on the job. (Tr. 11) No one told Cunningham the safe method for removing end doors from the four-wheel wagons. (Tr. 75) His foreman provided requested help only part of the time. (Tr. 13, 19)

Two (2) weeks before Cunningham injured himself in removing an end door from the four-wheel wagon without help, the fellow employee in the spray-paint area had been reassigned and moved elsewhere, and was not replaced. (Tr. 13, 14)

On Thursday, July 1, 1976, Cunningham's foreman told him he would receive a car end door later that day for processing and painting which had to be completed before 3:30 p.m. (Tr. 23) He was working by himself that day. (Tr. 90)

Around 2:00 p.m. Cunningham left the area to use the restroom. When he

returned he noticed the car end door lying flat on a four-wheel wagon which had arrived in his absence. (Tr. 24, 105)

He looked in nearby areas for help to remove and hang the end door for painting, but found no one. He looked for his foreman to ask for help, but could not find him. (Tr. 25, 26 and 91)

Having the completion deadline in mind, Cunningham went to the wagon intending all by himself to pick the door up, stand it on the floor, and walk it to the hooks for hanging and painting. (Tr. 26) He could not slide the door off the wagon because the door would receive scratches on the metal surface, which would require repair and thus delay the painting. Sometimes Cunningham had previously removed a door from

the wagon without assistance yet seemed to be getting along fine up until July 1, 1976. (Tr. 88)

Cunningham bent over and lifted the weight of the door off the cart--and felt something "pop" in his low back. (Tr. 27, 82)

He let the door back down on the wagon and after looking for an unknown period found his foreman, and reported the accident. He told his foreman he thought his back injury did not need medical attention at that time; and he returned to his job, got the door off the wagon and completed painting it. (Tr. 28, 86) This took place Thursday, July 1.

Cunningham returned to work Friday and again the following Tuesday, the weekend and holiday having intervened. During that period he experienced in-

creasing pain. The next day, Wednesday, July 7, he told his foreman that his back was bothering him more and he wanted to see a nurse or a doctor. The foreman sent him to see the company nurse, Agnes M. Schmidtbauer, located at the Beech Grove Shops. (Tr. 30, 118)

Beginning with that visit to the nurse, Cunningham was sent by successive referrals to a series of doctors--including company doctors--in the course of which numerous tests were undertaken and treatments tried without success.

A company doctor, Dr. Stanley Kryszek, on Thursday, July 8, 1976--the day after Cunningham was sent to the company nurse--examined Cunningham. (Tr. 30, 32 and 226) Cunningham was then treated conservatively at Harcourt Clinic, a medical group treating industrial cases--including Amtrak

employees--and was later sent to Dr. Richard Hutson for examination and treatment. (Tr. 35)

Finally, on February 14, 1977, spinal surgery was performed on his low back by Dr. Atz for the removal of material from the displaced (herniated) disc between lumbar vertebrae 4 and 5. (Tr. 138, 139)

The surgeon in October of 1978, released Cunningham to return to work with a weight lifting restriction of not over forty (40) pounds. (Tr. 153) In the opinion of the surgeon, Cunningham was left with a permanent residual impairment. (Tr. 155)

It was the opinion of the surgeon, based upon a reasonable degree of medical certainty, that Cunningham's injury sustained on July 1, 1976, caused the herniated disc. the surgery required and the eventual impairment--that is, inter-

mittent pain in the leg, weakness, reflex changes, numbness, degenerative arthriris or traumatic arthritis in the low back, and the prospect of another herniated disc caused by the additional load imposed on the remaining discs by the loss of the injured one. (Tr. 155, 157)

Likewise, Dr. Kryszek, the Amtrak physician--who was the first doctor to examine Cunningham, and the first to treat him--believed that in his opinion upon the history Cunningham gave him, Cunningham suffered lumbo-sacral strain when he lifted the door in question. The probability of that cause was more than fifty percent (50%). (Tr. 30, 32 and 226)

Cunningham lost wages from July 8, 1976 through November 27, 1976 totaling Forty-Four Thousand Four Hundred Seventy-

One Dollars ($44,471.00). (Tr. 76)

Cunningham on cross-examination said that he had received instructions in regard to lifting "objects"; that there was an Amtrak safety rule on that subject; that he was familiar with the rules and had a copy of them. (Tr. 80) He said that there had been a safety meeting on lifting prior to July 1, 1976. (Tr. 81) He had been told to bend his knees to lift and to "seek" help to do heavy lifting. (Tr. 80) But nothing about lifting heavy doors off of low wagons. (Tr. 79)

James Fowler was a carman-painter working the second shift from 3:30 p.m. to midnight in the spray-paint area. (Tr. 243) From April 1976 through June of 1976 he did the same kind of work that Cunningham performed on the earlier shift. (Tr. 243) During that time, there was no fellow employee working with Fowler in the spray-paint area, nor was Fowler

ever shown how to remove end doors from the wagon. (Tr. 244) Fowler said that the only way a single door could be removed from the wagon by one person would be to bend over, pick it up, set it on the ground and then "walk" it over to the hooks for hanging and painting. (Tr. 247) Fowler did not know of an Amtrak rule for the method of removing end doors from the wagons (sometimes called "carts"). (Tr. 250) Nor did Fowler ever hear at a safety meeting a discussion or demonstration on removal of end doors from the four-wheel wagons. (Tr. 250)

Three (3) witnesses corroborated in detail the extent and nature of Cunningham's physical disability without contradiction.

ARGUMENT

I.

The Verdict Is Contrary To Law

First, it disregards the Court's Instruction No. 10.

Second, it violates the intent and purpose of 45 U.S.C. §53 prohibiting contributory defense as a bar to recovery.

The Court's Instruction No. 10 explicitly told the jury that Amtrak had a duty to prescribe reasonably safe methods for the performance of work and reasonable assistance to accomplish it; and that failure to discharge either duty would constitute negligence.

The evidence is abolutely uncontroverted that Amtrak failed in both duties. It did not instruct Cunningham on how to remove those heavy and unwieldy doors from the car. On numerous prior occasions over the preceding fortnight it had fail-

ed to furnish him any help whatsoever to remove the doors from the car. And it failed to furnish any on the occasion of his injury.

On the day he was injured Cunningham had been directed to complete the painting of the door before 3:30 p.m.; yet it did not arrive in his department until after 2:00 p.m. Within that span he had to remove the door from the cart, hang it on hooks, apply the primer, let it dry, than apply the first coat, let it dry, then apply the second coat in time for it to dry before the deadline.

So to meet the deadline, he decided to go it alone. Surely public policy does not sanction faulting an employee who follows orders under those handicaps, when on previous occasions he had performed the same task despite the same lack of help, yet without injury.

That Cunningham's injury resulted from his performance under those handicaps is established beyond quibble. When he felt the "pop" in his back he lowered the door back onto the cart. Then he spent some minutes hunting up his foreman, to whom he reported that he had hurt his back lifting the door off the wagon but thought the injury did not require medical attention at that time. After two (2) more working days of increasing pain, Cunningham sought help from the company nurse; next from the company physician, Dr. Kryszek; and then, over a period of several months, passed trhough the hands of various physicians, and underwent various prescribed treatments--finally ending with spinal surgery by Dr. Atz for removal of the ruptured disc material.

That the injury to the disc resulted

from the lifting of the door was established by the testimony of the surgeon, of the company doctor, of Cunningham himself, and of his wife and his acquaintances. The record is utterly devoid of any contrary evidence.

Amtrak negligence as a matter of law, and the resulting injuries to Cunningham, are proved without contradiction and beyond dispute.

Therefore, even assuming that Cunningham's manner of performing his task constituted contributory negligence on his part--an assumption which seems outrageous--such contributory negligence could not bar recovery. 45 U.S.C. §53 forbids it. The most the jury could lawfully do would be to apportion the negligence of the parties and diminish Cunningham's damages in the proportion of fault attributable to him.

However, considering the fact of Amtrak's negligence and the assumption of Cunningham's contributory negligence, the jury could not lawfully have diminished his damages to zero. For to do so was to bar any recovery because of contributory negligence and, therefore, to defeat the clear intent of the Congress in 45 U.S.C. §53.

Therefore, the verdict is necessarily contrary to law.

II.

Error In Refusing New Trial

The verdict is contrary to the evidence.

All of the substantial evidence challenges the verdict. The fact of Cunningham's injury is not clouded by any evidence beyond his own cross-

examination answers that he was aware of the rule on how to lift objects and that he worked two (2) more days before yielding to the pain. All such matters bear upon the contributory negligence factor--which cannot be a bar to recovery.

Negative verdicts are not immune to attack where reasonable men cannot supportthem. In the instant case the verdict arises solely from conjecture, sheer guess work and an unjust rejection of solid and uncontroverted evidence of negligence, proximate cause and various injuries.

> ". . . a verdict is not supported by substantial evidence if it is based on merely speculation, surmise, conjecture or guess, if it is 'clearly,' 'flagrantly,' 'palpably' or

"'manifestly,' against the weight or preponderance of the evidence."

5 Am.Jur.2d 276 "Appeal and Error §835"

Under 45 U.S.C., §51, liability of a carrier is stated as follows:

"Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, . . ." (My emphasis)

In Rogers v. Missouri Pacific R. Co., 352 U.S. 500, at page 506 and 508, 77 S.Ct. 443, at page 448, 1 L.Ed.2d 493, the Court stated:

"Under this statute the test of a jury case is simply whether the

"proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

* * *

"The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make the inference."

This law was also followed in the case of Gibson v. Elgin, Jolliet and Eastern Railroad Company, (1957, 7th Cir.) 246 F.2d 834.

The Courts have consistently held that under the FELA an injured employee is allowed to recover even where the negligence of the employer has been minimal. Gallick v. Baltimore and Ohio R. R. Co., 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963); Webb v. Illinois Central Railroad Co., 352 U.S. 512, 77 S.Ct. 451, 1 L.Ed.2d 764 (1957); Tennant v. Peoria and Pekin Union Rail-

road Co., 321 U.S. 29, 65 S.Ct. 409, 88 L.Ed. 520, rehearing denied, 321 U.S. 802, 64 S.Ct. 610, 88 L.Ed. 1089 (1944); Rodriguez v. Delray Connecting Railroad, (6th Cir. 1972) 473 F.2d 819; and Eggert v. Norfolk & W.Ry. Co., (2nd Cir. 1976) 538 F.2d 509.

The carrier is also required to provide employees with sufficient help in which to perform the work assigned to them. Blair v. Baltimore and O.R.R., 323 U.S. 600, 65 S.Ct. 545, 89 L.Ed. 490 (1945). If the failure to provide sufficient help to an employee is a cause, no matter how slight, of injuries to the employee, then the carrier is liable for negligence under FELA. Deere v. Southern Pacific Co., 123 F.2d 438 (9th Cir. 1941) cert. denied, 315 U.S. 819, 62 S.Ct. 916, 86 L.Ed. 1217 (1942)

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(Argued November 7, 1980)

January 28, 1981.

Before

Hon. Walter J. Cummings, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. William J. Campbell, Senior District Judge

LEE R. CUNNINGHAM, Plaintiff-Appellant,	)	
vs.	)	80-1252
NATIONAL RAILROAD PASSENGER CORPORATION d/b/a AMTRAK, Defendant-Appellee.	)	

ORDER

Plaintiff-appellant Cunningham brought a claim under the Federal Employer's Liability Act, 45 U.S.C. §51 et seq. (1976) ("FELA"), for personal injuries allegedly incurred in 1976 while lifting railroad car doors in the course of his employment with defendant-appellee Amtrak. Cunningham appeals from the jury's general verdict for Amtrak and from the district court's denial of Cunningham's motion for a new trial.

Cunningham primarily contends that there was evidence to sustain a finding that Amtrak was negligent to some degree in failing to provide adequate instruction to him on the proper way to lift railroad car doors, and in failing to provide adequate staff to assist him in lifting

the doors as required by his work. Cunningham claims that while he may have been contributorily negligent, so was Amtrak, and thus as a matter of law he should have obtained a jury verdict in his favor, with the amount of damages reduced "in proportion to the amount of damages attributable to (him)". 45 U.S.C. §53

Cunningham does not challenge the district court's evidentiary rulings 1/, jury instructions or other questions of law involved in the trial. Cunningham's argument on this appeal amounts to an assertion that the evidence cannot conceivably sustain the jury verdict. At trial, however, Cunningham apparently did not believe that he was entitled as a matter of law to prevail on his claim, as he declined to move for either a directed verdict prior to submission of the case to the jury, or a judgment notwithstanding verdict once the verdict was returned. These motions give the district court an opportunity to determine the legal sufficiency of the evidence, and are necessary to preserve that determination for appellate review absent extraordinary circumstances,

---

1/ Cunningham contends that the district court improperly excluded evidence of certain medical expenses he incurred, which was relevant to the issue of damages. In view of our disposition of this case, we need not reach that question.

which are not alleged here. See Berman v. Palatine Insurance Co., 379 F.2d 371, 373 (7th Cir. 1967). By failing to move for either a directed verdict or judgment n.o.v., Cunningham in effect conceded that the evidence adduced at trial raised sufficient questions to justify sending the case to the jury. Owens v. Atchison, Topeka & Santa Fe Rwy. Co., 393 F.2d 77, 78 (5th Cir. 1968). Thus, Cunningham's challenge to the sufficiency of the evidence to support the jury's verdict is improperly raised on appeal.

Turning to Cunningham's motion for a new trial, we note that "(i)t is well settled that the disposition of a motion for a new trial rests within the sound discretion of the trial court." Stinebower v. Scala, 331 F.2d 366, 367 (7th Cir. 1964). The district court's denial of Cunningham's motion for a new trial must be sustained absent "exceptional circumstances showing a clear abuse of discretion." Ibid. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 247-48 (1940), ("(N)either this Court nor the Circuit Court of Appeals will review the action of a federal trial court in granting or denying a motion for a new trial for error of fact" except in exceptional cases). Cunningham sought a new trial for the same reasons he directly challenged the verdict, namely, that he believed that the evidence could not sustain the jury's finding. Viewed in the light most favorable to Amtrak, the prevailing party below, the evidence shows that Cunningham had been instructed at a company meeting and through a company rule

on the proper way to lift objects in the course of his work, and that there usually were fellow employees available to help him move the doors. A reasonable jury could conclude that Cunningham's decision not to wait for help in lifting the door or his failure to lift it properly on his own was not the fault of Amtrak. The district court thus acted within its discretion when it refused to grant Cunningham's motion for a new trial.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LEE R. CUNNINGHAM, Plaintiff,	)	
vs.	)	IP 77-373-C
NATIONAL RAILROAD PASSENGER CORPORATION d/b/a AMTRAK, Defendant.	)	

JUDGMENT

This action came on for trial before the Court and a jury and the issues have been tried and the jury having returned its verdict finding for the defendant, which verdict reads as follows:

(H.I.)

IT IS CONSIDERED AND ADJUDGED that the plaintiff take nothing by way of his complaint and that the defendant recover its costs incurred herein.

Dated this 31 day of January, 1980

S. HUGH DILLIN, JUDGE

Copies to:
John C. Green, 2470 One Indiana Square, Indpls., IN 46204
John Kilinski, 1313 Merchants Bank Bldg., Indpls., IN 46204

INSTRUCTION NO. 10

In connection with its duty to furnish its employees with a reasonably safe place in which to work, the defendant had a duty to prescribe reasonably safe methods for the performance of work together with reasonable assistance to accomplish its purposes. The failure to comply with either of such duties would constitute negligence.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LEE R. CUNNINGHAM, Plaintiff,	)	
vs.	)	IP 77-373-C
NATIONAL RAILROAD PASSENGER CORPORATION d/b/a AMTRAK, Defendant.	)	

MOTION FOR NEW TRIAL

Lee R. Cunningham, by counsel, respectfully requests that the verdict of the jury in the above-entitled cause be set aside and that the judgment entered on the verdict on January 31, 1980, be vacated and set aside and that a new trial be granted to Lee R. Cunningham for the following reasons:

1. The verdict is contrary to law;

2. The verdict is contrary to the evidence;

3. The verdict is contrary to the weight of the evidence; and

4. That the Court erred in granting Amtrak's Motion in Limine excluding from admission into evidence the medical expenses incurred by Lee R. Cunningham.

WHEREFORE, Lee R. Cunningham requests that the jury verdict be set aside and that the judgment in this cause be vacated and that a new trial be granted to Lee R. Cunningham and further requests all other proper relief in the premises.

Respectfully submitted,
SMITH and JONES

By _____
John C. Green

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion For New Trial was hand delivered to Mr. John T. Kolinski, Barnes, Hickam, Pantzer & Boyd, 1313 Merchants Bank Building, Indianapolis, Indiana 46204 on this 11th day of February, 1980.

_____
John C. Green

SMITH and JONES
One Indiana Square, Suite 2470
Indianapolis, Indiana 46204
632-4402

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LEE R. CUNNINGHAM, Plaintiff,	)	
vs.	)	IP 77-373-C
NATIONAL RAILROAD PASSENGER CORPORATION d/b/a AMTRAK, Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that Lee R. Cunningham, plaintiff herein, hereby appeals to the United States Court of Appeals for the 7th Circuit from the Judgment of January 31, 1980 and from the denial of plaintiff's Motion For New Trial entered on the 12th day of February, 1980.

Respectfully submitted,
SMITH and JONES

By _____
John C. Green

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice Of Appeal

was forwarded by U.S. Mail, postage paid to Mr. John T. Kolinski, Barnes, Hickam, Pantzer & Boyd, 1313 Merchants Bank Building, Indianapolis, Indiana 46204 on this 26th day of February, 1980.

John C. Green

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

LEE R. CUNNINGHAM,)
Plaintiff-Appellant,)
vs.)
NATIONAL RAILROAD PASSENGER)
CORPORATION d/b/a AMTRAK,)
Defendant-Appellee.)

APPELLANT'S PETITION FOR REHEARING

Lee R. Cunningham, Appellant herein, respectfully Petitions the Court pursuant to the Federal Rules Of Appellate Procedure 40(A), for a rehearing based upon the grounds that the United States Court Of Appeals For The Seventh Circuit on January 28, 1981 overlooked or misapprehended the following points of law or fact:

1. The verdict in this cause was contrary to law in that uncontroverted evidence proved the National Railroad Passenger Corporation d/b/a Amtrak negligent. The jury defeated Appellant's

claim by finding Appellant contributorily negligent in violation of 45 U.S.C. 853. The undisputed evidence showed that Amtrak failed to provide a reasonably safe place to work in that:

a. Amtrak failed to instruct its employees on safe methods and procedures for removing end doors from wagons for the purpose of hanging the same for painting;

b. Failed to provide reasonable assistance to accomplish its purposes; and

c. Failed to provide help from fellow employees in the lifting of end doors.

2. The District Court abused its discretion in denying Appellant's Motion For A New Trial. Viewing the evidence most favorably to Amtrak, all the evidence leads to the one conclusion that Amtrak

was negligent with resulting damages. Amtrak failed to provide a reasonably safe place to work in not instructing its employees on safe methods and procedures for moving end doors from wagons for the purpose of hanging the same for painting. Amtrak failed to provide reasonable assistance to accomplish its purposes and failed to provide help from fellow employees in the lifting of end doors. The evidence viewed in light most favorable to Amtrak, may well show contributory negligence on the part of Appellant, but such contributory negligence cannot defeat Appellant's claim. 45 U.S.C. §53.

Respectfully submitted,
SMITH and JONES

By_____
John C. Green
Robert W. Geddes

Attorneys for Plaintiff-Appellant

PROOF OF SERVICE

The undersigned hereby certifies that on the 10th day of February, 1981, two (2) copies of Appellant's Petition For Rehearing were sent by U. S. Mail, postage prepaid to James A. Strain and Peter J. Rusthoven, Barnes, Hickam, Pantzer & Boyd, 1313 Merchants Bank Building, Indianapolis, Indiana 46204.

John C. Green

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45 U.S.C., §51

"§51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of the employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth

shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404."

45 U.S.C., §53

"§53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Apr. 22, 1908, c. 149, §3, 35 Stat. 66."

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No. 80-1927

In the Supreme Court of the United States

OCTOBER TERM, 1980

LEE R. CUNNINGHAM,

Petitioner,

vs.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review the affirmance of a jury verdict in an FELA case where the petitioner not only fails to argue that the court of appeals' decision either conflicts with any other court's decision or otherwise raises an issue justifying review under SUP. CT. R. 17.1, but also does not even properly assert that any legal rulings were erroneous.

2. Whether the court of appeals sanctioned a departure from the usual and accepted practice when it held that the district court did not abuse its discretion in denying petitioner's motion for a new trial.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Summary of Argument	1
Argument	3
1. Petitioner Does Not Purport to Raise an Issue Worthy of Review	3
2. By Holding That the District Court Had Not Abused Its Discretion in Denying His Motion for New Trial, the Court of Appeals Did Not Sanction a Departure from the Usual and Accepted Practice	4
Conclusion	5

CITATIONS

Cases

	PAGE
Blair v. *Baltimore and O. R.R.*, 323 U.S. 600 (1945)	5
Deere v. *Southern Pacific Co.*, 123 F.2d 438 (9th Cir. 1941) *cert. denied*, 315 U.S. 819 (1942)	5
Eggert v. *Norfolk & W. Ry. Co.*, 538 F.2d 509 (2d Cir. 1976)	5
Gallick v. *Baltimore and Ohio R.R. Co.*, 372 U.S. 108 (1963)	5
International Business Machines Corp. v. *Catamore Enterprises, Inc.*, 548 F.2d 1065 (1st Cir.) *cert. denied*, 431 U.S. 960 (1976)	3
Owens v. *Atchison, Topeka and Santa Fe R. Co.*, 393 F.2d 77, 78 (5th Cir.) (per curiam), *cert. denied*, 393 U.S. 855 (1968)	3
Rodriguez v. *Delray Connecting Railroad*, 473 F.2d 819 (6th Cir. 1973)	5
Rogers v. *Missouri Pacific R. Co.*, 352 U.S. 500 (1957)	5
Tennant v. *Peoria and Pekin Union Railway Co.*, 321 U.S. 29, *reh. denied*, 321 U.S. 802 (1944)	5
United States v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 247-48 (1940)	4
Webb v. *Illinois Central Railroad Co.*, 352 U.S. 512 (1957)	5

Other Authorities

Sup. Ct. R. 17.1	3
45 U.S.C. § 53 (1976)	3

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BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

Petitioner does not even purport to present to this Court any issue that justifies review. Instead, he attempts to disguise and reargue his sufficiency of the evidence contention, a contention which the court of appeals held both had been improperly presented to the district court and was without merit. At bottom, petitioner is unhappy that the jury disagreed with his view of the evidence.

In an altogether unremarkable order, the court of appeals held that by failing to move for a directed verdict or for

judgment notwithstanding the verdict, petitioner failed to preserve for review his sufficiency of the evidence claim. It also held that on the evidence presented to the jury, the jury could have reasonably determined that respondent was not negligent. Accordingly, it held that the district court's refusal to grant petitioner's motion for a new trial was not an abuse of discretion. None of these holdings is improper. None of these holdings is worthy of review by this Court.

ARGUMENT

1. *Petitioner Does Not Purport to Raise an Issue Worthy of Review.* Nowhere in his petition for certiorari does petitioner purport to raise an issue worthy of this Court's review. He does not contend that the court of appeals' decision conflicts with that of any other appellate court, sanctions a departure from the accepted and usual course of judicial proceedings, or decides an important, unsettled question of federal law. *See,* SUP. CT. R. 17.1. Indeed, there is nothing in the petition indicating any important issue arises from the court of appeals' order.

Instead, petitioner reasserts the basically factual arguments he made to the appellate court. While he purports to cast his first issue as an issue of law, he does not contend that the jury was improperly instructed or that any court made any legal error. His argument is that on his view of the evidence, respondent was negligent and the worst the jury could have done was to find that petitioner was contributorily negligent, a finding that could diminish, but not entirely bar recovery under 45 U.S.C. § 53 (1976). *See,* Petition at 17. Similarly, given petitioner's view of the evidence, the jury must have disregarded the district court's Instruction 10. *See,* Petition at 14.

Petitioner's argument is a sufficiency of the evidence argument which the court of appeals properly held had been waived by petitioner's failure to move for a directed verdict or a judgment notwithstanding the verdict. *See,* Petition A-2, A-3. The court of appeals' holding is consistent both with other courts' decisions in FELA cases and in general. *See, e.g., Owens* v. *Atchison, Topeka and Santa Fe R. Co.,* 393 F.2d 77, 78 (5th Cir.) (per curiam, *cert. denied,* 393 U.S. 855 (1968); *International Business Machines Corp.* v. *Catamore Enterprises, Inc.,* 548 F.2d 1065 (1st Cir.), *cert. denied,* 431 U.S. 960 (1976). Petitioner does not contend otherwise.

Respondent submits that this Court should refrain from granting certiorari in a case where petitioner not only failed to preserve his sole "legal" issue for appeal, but also failed to challenge the court of appeals' holding that no legal issue was properly preserved.

2. *By Holding That the District Court Had Not Abused Its Discretion in Denying His Motion for New Trial, the Court of Appeals Did Not Sanction a Departure from the Usual and Accepted Practice.* Petitioner argues that the weight of the evidence was against the jury's verdict in contending that he should have been granted a new trial. *See,* Petition at 20. Although he neither argues that the court of appeals applied an incorrect legal standard in reviewing the district court's denial of his motion for new trial, nor points to any specific error in the appellate court's legal and factual analysis, petitioner nonetheless asserts that the jury's verdict was erroneous.

The court of appeals properly applied an abuse of discretion standard in reviewing the district court's denial of petitioner's new trial motion. *See,* Petition at A-3; *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 247-48 (1940). In applying that standard, it found that there was evidence which demonstrated that petitioner had been instructed at a company meeting and through a company rule on the proper way to lift objects and that employees were usually available to help him. In short, the court of appeals found that a jury reasonably could have concluded that respondent was not negligent at all with respect to petitioner, and that petitioner's injury was solely his own fault. It therefore held there was no abuse of discretion by the district court.

Petitioner has not challenged the court of appeals' factual analysis by any record citation, or otherwise, sufficient to demonstrate it was erroneous. Nor has he challenged the standard the appellate court used in reviewing the district court. Rather, with one exception, he has cited to this Court cases in which issues under the FELA were held to have

been properly submitted to a jury. See, Petition at pp. 20-22. Thus, for example, in *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500 (1957), this Court reversed a court of appeals and reinstated the jury's verdict in an FELA case. *See also, Gallick* v. *Baltimore and Ohio R.R. Co.*, 372 U.S. 108 (1963) (reversing state appellate court and reinstating jury verdict); *Webb* v. *Illinois Central Railroad Co.*, 352 U.S. 512 (1957) (reversing appellate court and reinstating jury verdict); *Tennant* v. *Peoria and Pekin Union Railway Co.*, 321 U.S. 29, *reh. denied*, 321 U.S. 802 (1944) (reversing appellate court and reinstating jury verdict); *Blair* v. *Baltimore and O. R.R.*, 323 U.S. 600 (1945) (holding evidence was sufficient to go to the jury and reversing appellate court); *Eggert* v. *Norfolk & W. Ry. Co.*, 538 F.2d 509 (2d Cir. 1976) (reversing directed verdict); and *Rodriguez* v. *Delray Connecting Railroad*, 473 F.2d 819 (6th Cir. 1973) (affirming jury verdict). Ironically, the one case cited by petitioner in which the FELA issues were held properly not sent to a jury involved a directed verdict for the defendant railroad. *Deere* v. *Southern Pacific Co.*, 123 F.2d 438 (9th Cir. 1941), *cert. denied*, 315 U.S. 819 (1942).

As in the cases petitioner cites as precedent, this case was submitted to the jury. In short, petitioner got his wish. Petitioner simply challenges the fact that he was unable to convince the jury that respondent was liable. That he received an adverse result from a jury does not warrant this Court's grant of certiorari.

CONCLUSION

The court of appeals' decision affirming the district court's judgment on the jury verdict and denial of petitioner's motion for new trial was correct and consistent with all existing authority. That petitioner lost before a

jury in an FELA case simply does not justify review by this Court. Petitioner failed properly to preserve any legal issue and raised no factual issue of any import. Respondent submits under these circumstances this Court should not issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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